NO. 93262-0
COA NO. 47523-5-II
Cowlitz Co. Cause NO. 15-1-00405-8

SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANDY P. MATHERS,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

RYAN JURVAKAINEN
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I. IDENTITY OF RESPONDENT.

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests the Washington State Supreme Court deny discretionary review of the May 10, 2016, Court of Appeals order, Number 47523-5-II. This decision held deoxyribonucleic acid (DNA) fee and Victim Penalty Assessment (VPA) fee are mandatory fees, and the sentencing court was not required to do an individualized inquiry into the petitioner's current and future ability to pay prior to its imposition of those mandatory fees.

II. COURT OF APPEALS DECISION.

The Court of Appeals correctly decided this matter, holding that DNA and VPA fees are mandatory and that the sentencing court was not required to do an individualized inquiry into the petitioner's current and future ability to pay prior to imposing those mandatory fees.

III. ISSUE PRESENTED FOR REVIEW

1. Are sentencing courts required to do an individualize inquiry into defendants' current and future ability to pay prior to imposing mandatory DNA and VPA fees?

IV. STATEMENT OF THE CASE

Respondent agrees with Petitioner's recitation of the Statement of the Case.

V. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS DECISION.

Under RAP 13.4(b) a petition for review will be accepted by the Supreme Court only:

(1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
(2) if the decision of the Court of Appeals is in conflict with a decision of another Court of Appeals; or
(3) if a significant question of law under the Constitution of the State of Washington or the United States is involved; or
(4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should deny review because this petition for review does not meet any of the grounds for review outlined in RAP 13.4(b).

VI. ARGUMENTS.

1. The Court of Appeals did not render a decision that is in conflict with a decision of the Supreme Court and did not misapprehend the scope of this Court's holding in Blazina.

The Court of Appeals in an unpublished opinion found that "Although Blazina involved the appeal of LFOs including DNA and VPA

fees, the [Supreme Court] only reviewed discretionary LFOs. 182 Wash.2d at 831, 344 P.3d 680. The [Supreme Court] listed all the LFOs imposed in Blazina's case but then stated, 'The trial court, however, did not examine Blazina's ability to pay the discretionary fees on the record.' Blazina, 182 Wash.2d at 831, 344 P.3d 680 (emphasis added). It also stated, 'A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review.' Blazina, 182 Wash.2d at 832, 344 P.3d 680(emphasis added). Throughout the opinion, the court made clear that it was reviewing only discretionary LFOs. Blazina, 182 Wash.2d at 834-35, 837-38, 344 P.2d 380." State v. Mathers, 193 Wash.App. 913 (2016).

The Court of Appeals' interpretation regarding the scope of Blazina is reasonable and is in conformation with this Court's ruling in State v. Curry, 118 Wn.2d 911, 829 P.2d 775 (1983), that VPA fees are mandatory. Curry, 118 Wash.2d at 917-18.

2. The Court of Appeals did not render a decision that is in conflict with a decision of another Court of Appeals.

Petitioner does not argue that the Court of Appeals' decision in this case conflicts with decisions of other Court of Appeals regarding

mandatory and discretionary LFOs. The decision in Mathers is consistent with other Court of Appeals decisions.

In State Lewis, 2016 WL 3570550 (2016), Number 72637-4-I, Court of Appeals for Division I found that DNA fee is mandatory and the DNA fee statute does not violate equal protection. Lewis, 2016 WL 3570550 (2016).

In State v. Lundy, 176 Wash.App. 96 (2013), the court noted that it is important to distinguish between mandatory and discretionary legal financial obligations "because for mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account." Lundy, 176 Wash.App. at 102. "Our courts have held that these mandatory obligations are constitutional so long as 'there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants.'" Id. at 102-103. The victim assessment fee is required by RCW 7.68.035(1)(a) and the DNA collection fee is required by RCW 43.43.7541 "irrespective of the defendant's ability

to pay." Id. at 103. "Because the legislature has mandated imposition of these legal financial obligations, the trial court's 'findings' of a defendant's current or likely future ability to pay them is surplusage." Id. at 103.

In State v. Kuster, 175 Wash.App. 420 (2013), a jury found the defendant guilty of second degree rape. At sentencing, the trial court imposed $800 in legal financial obligations consisting of a $500 victim assessment fee, $200 in court costs, and a $100 DNA collection fee. It appears the trial court did not consider the defendant's current or likely future ability to pay for the imposed legal financial obligations. Id. at 422. The defendant appealed the imposition of his legal financial obligations. Id. at 423. On appeal, the court noted that "[two] of the LFOs imposed by the trial court on Mr. Kuster are not discretionary costs governed by RCW 10.01.160. They are, instead, statutorily mandated financial obligations. The $500 victim assessment is mandated by RCW 7.68.035 and the $100 DNA collection fee is mandated by RCW 43.43.7541. Neither statute requires the trial court to consider the offender's past, present, or future ability to pay." Id. at 424.

3. The Court of Appeals did not render a decision that raise a significant question of law under the Constitution of the State of Washington or the United States.

Pursuant to RCW 43.43.7541, "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754. This fee shall not be imposed on juvenile offenders if the state has previously collected the juvenile offender's DNA as a result of a prior conviction."

The DNA collection statue makes the DNA fee mandatory for adult offenders and only allows for it to be waive on juvenile offenders, if the state has previously collected the juvenile offender's DNA. The legislator could have allowed for a similar waiver for indigent adult offenders had it intended to do so, but the legislator allowed for no such waiver for adult offenders.

Pursuant to RCW 7.68.035(1)(a), " When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

Pursuant to RCW 7.68.035(2), "The assessment imposed by subsection (1) of this section shall not apply to motor vehicle crimes defined in Title 46 RCW except those defined in the following sections: RCW 46.61.250, 46.61.522, 46.61.024, 46.52.090, 46.70.140, 46.61.502,

46.61.504, 46.52.101, 46.20.410, 46.52.020, 46.10.495, 46.09.480, 46.61.5249, 46.61.525, 46.61.685, 46.61.530, 46361.500, 46.61.015, 46.52.010, 46.44.180, 46.10.490(2), and 46.09.470(2).

The VPA statue makes the VPA fee mandatory for any person found guilty in any superior court of having committed a crime, except as provided in subsection (2). The legislator could have allowed for a similar waiver/exception regarding indigent offenders had it intended to do so, but the legislator allowed for no such waiver.

The DNA and VPA statues make the DNA and VPA fees mandatory to all applicable offenders regards of their financial situations.

4. The Court of Appeals did not render a decision that involves an issue of substantial public interest that should be determined by the Supreme Court.

The statutory requirement that DNA and VPA fees be mandatory does not implicate equal protection or substantive due process violations that require review by the Supreme Court.

There is no equal protection violation. The Petitioner's equal protection claim is not persuasive. The Petitioner's reliance on Jafar v. Webb deals with civil litigants and is not applicable to criminal defendants and the petitioner's case. The Jafar case deals with how the imposition of

mandatory fees in civil cases bars some people in civil cases from the court process.

In analyzing an equal protection claim, the rational relationship test applies to the challenge of mandatory fees. The test requires the existence of a legitimate governmental objective and a rational means of achieving it. The rational test is highly deferential to the legislature. Lewis, 2016 WL 3570550 (2016). A statute is presumed constitutional. State v. Shawn P., 122 Wash.2d 553, 561 (1993). The party challenging the statue must show the legislative classification is "purely arbitrary." In re Det. Of Thorell, 149 Wash.2d 724, 749 (2003). A statue should be upheld unless the classification "rest on grounds wholly irrelevant to the achievement of a legitimate state objective." State v. Heiskell, 129 Wash.2d 113, 123-24 (1996). The party challenging the legislation "must show, beyond a reasonable doubt, that no state of facts exist or can be conceived sufficient to justify the challenged classification." Seeley v. State, 132 Wash.2d 776, 795-96 (1997).

The case relied upon by the Petitioner for its equal protection claim is not applicable to the Petitioner, criminal defendants, or criminal cases. DNA and VPA statues on their face draw no distinctions and the fees are

imposed only after a conviction. Both statues do not create any arbitrary classifications. The DNA and VPA fees do not bar a person from the court process in a criminal case because they are only imposed after a person is convicted of a crime and has had access to the court process. The Petitioner also has not shown how the DNA and VPA statutes do not rational achieve legitimate governmental objectives. Both statues are constitutional and there is no equal protection violation needing the Supreme Court's review.

There is no substantive due process violation. The petitioner's argument that his substantive due process rights are violated is not persuasive. In Curry, this court previously held that the VPA statute did not violate due process because "no defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful." Curry, 118 Wash.2d at 918. In Lundy, the appellate court followed this precedent in the context of the DNA statue. Lundy, 176 Wash.App. at 102-03. In Lundy, the court held that, "[O]ur courts have held that these mandatory obligations are constitutional so long as 'there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants." Lundy, 176 Wash.App. at 102-03.

Due process precludes the jailing of an offender for failure to pay a fine if the offender's failure to pay was due to his or her indigence. State v. Nason, 168 Wash.2d 936, 945 (2010). Under certain circumstances, however, the State may imprison an offender for failing to pay his or her LFOs, such as if the offender is capable of paying but willfully refuses to pay or if the offender does not make a genuine effort to seek employment or borrow money in order to pay. Id. at 945. Due process requires the court to inquire into the offender's ability to pay, but the burden is on the offender to show nonpayment is not willful. Id. at 945. Therefore, it "is at the point of enforced collection ..., where an indigent may be faced with the alternatives of payment or imprisonment, that he 'may assert a constitutional objection on the ground of his indigency.'" Curry, 118 Wash.2d at 917. There is no substantive due process violation needing the Supreme Court's review.

VII. CONCLUSION.

There are no reviewable issues for this Court to decide. The petition for review should be denied.

Respectfully submitted this 8th day of August 2016.

Ryan Jurvakainen
Prosecuting Attorney
Cowlitz County, Washington

By: _____

MIKE NGUYEN, WSBA # 31641
Deputy Prosecuting Attorney
Attorney for Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via e-mail to the following:

Supreme Court
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and,

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 8th, 2016.

Michelle Sasser

Michelle Sasser

OFFICE RECEPTIONIST, CLERK

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Subject: FW: PAs Office Scanned Item ANDY P. MATHERS, 93262-0 RESPONSE TO PETTION FOR REVIEW

Attached, please find the Response to Petition for Review regarding the above-named Petitioner.

If you have any questions, please contact this office.

Thanks, Michelle Sasser

From: pacopier_donotreply@co.cowlitz.wa.us [mailto:pacopier_donotreply@co.cowlitz.wa.us]
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